United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21150

ERNEST AUSTIN

Petitioner,

VS.

DISTRICT OF COLUMBIA

Respondent,

APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

BRIEF FOR PETITIONER IN SUPPORT OF MOTION FOR HEARING EN BANC AND IN SUPPORT OF PETITION FOR ALLOWANCE FOR AN APPEAL

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CONSTITUTION OF THE UNITED STATES OF AMERICA

CASES CITED

DISTRICT OF COLUMBIA CODE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ERNEST AUSTIN *

Petitioner *

*

vs. No. 21150

*

UNITED STATES OF AMERICA *

Respondent *

STATEMENT OF QUESTIONS INVOLVED

1. Whether the statute under which appellant was charged, to wit, Title 22, Section 2722 of the Code of Laws for the District of Columbia, was so vague and uncertain as to render the specific prohibition unknown, and hence make the statute inoperable and unconstitutional.

The trial Court answered in the negative. The District of Columbia Court of Appeals, the Court below, made no specific finding as published no opinion in this case as to any of the issues raised. The Court below stated in a general opinion that the District of Columbia Court of Appeals found no error in the findings of the trial Court as to any of the issues raised by appellant.

Petitioner contends the question should have been answered in the affirmative.

2. Whether the information under which appellant was charged and the affidavit in support of the warrant for the arrest of petitioner, made out a punishable offense.

The trial Court answered in the affirmative. The Court below, the District of Columbia Court of Appeals, did not answer this issue.

P Petitioner contends that the answer should have been in the negative.

3. Whether the acts of the arresting officer, when going with the alleged "special employee" of the Metropolitan Police Department of the District of Columbia, who in this instance was an alleged prostitute, to the petitioner's place of business constituted entrapment.

The trial Court answered in the negative. The issue was not specifically answered by the Court below other than as it may have been included as alluded to in the general opinion set forth in paragraph one (1) above.

Petitioner contends the answer should have been in the affirmative.

4. Whether the trial Court erred in refusing petitioner's motion to have the alleged special employees, known only to the Police Department, properly identified, and brought before the trial Court for corroboration of the officers' testimony and to afford petitioner an opportunity to cross examine said special employees as to whether they were in fact prosittutes.

The trial Court answered in the negative. The District of Columbia Court of Appeals, the Court below did not specifically address itself to this question other than to say that the Court found no error in the record from the trial Court.

Petitioner contends that the answer should have been in the affirmative.

5. Whether the trial Court erred in denying petitioner's motion to suppress and to dismiss information, filed March 24, 1966.

The Court below did not specifically answer this question other than its general statement that it found no error in the rulings of the trial Court.

Petitioner contends the answer should have been in the affirmative.

6. Whether the trial Court erred in denying petitioner's motion to dismiss information filed April 8, 1966.

The Court below again did not specifically answer this question other than its general finding that the Court below found no error in the rulings of the trial Court.

Petitioner contends that the answer should have been made in the affirmative.

7. Whether the trial Court erred in denying petitioners' motion for judgement of acquittal, and/or new trial, and for arrest of judgement, filed June 7, 1966.

The trial Court did not specifically answer this question other than its general finding that it found no error in the ruling of the trial Court.

Petitioner contends the answer should have been in the affirmative.

8. Whether the trial Court erred at the close of the trial by charging the jury, by way of defining a bawdy house, under Title 22, Section 2712, as being applicable in this case rather than Title 22, Section 2722, of the Code of Laws for the District of Columbia,1951 edition; as set forth in defendant's motion for judgement of acquittal and/or new trial, and for arrest of judgement.

The District of Columbia Court of Appeals failed to rule on this point.

Appellant contends the Court should have ruled in the affirmative.

9. Whether the trial Court erred in failing to grant a new trial on motion after verdict, because, at the close of the trial and while the jury was deliberating, a member on the jury list, who was not selected for defendant's panel, approached counsel for defendant outside the Courtroom at the close of the trial but before the verdict, and advised said counsel that a member of the jury panel then deliberating defendant's case, had stated during the course of defendant's trial, in private, that any defendant who requested a jury trial was automatically guilty as far as that juror was concerned.

The Court below did not rule on this point, which was brought to the attention of the trial Court in appellant's motion for judgement of acquittal and, or, new trial, and for an arrest of judgement.

Appellant contends the Court should have ruled in the affirmative.

10. Whether the trial Court erred in refusing appellant's request to charge the jury, as to the meaning and purpose of Title 47, Section 2902 of the Code of Laws for the District of Columbia,1961 edition, in determining the intent and acts of defendant.

The Court below did not rule on this issue. Appellant contends the Court should have ruled in the affirmative.

11. Whether the due process of law is denied residents of the District of Columbia by reason of the manner of appointment of the members of that Court.

12. Whether appellant was denied due process of law, by the trial Court not permitting the Court Reporter to record bench conferences

between counsel and the Court. This question was not raised in the District of Columbia Court of Appeals because the issue was not recorded for appeal.

STATEMENT OF THE CASE

On November 17, 1965, there was filed in the District of Columbia Court of General Sessions information number U.S. 10134-65, charging appellant with operating a bawdy house in violation of Title 22, District of Columbia Code, Section 2722. A companion information was also filed, as number U.S. 35554-65, charging appellant with vagrancy in violation of Title 22, District of Columbia Code, Section 3302. The facts which constituted the sole and entire basis of the charges against appellant, and the subsequen trial, as set forth in the affidavit of Officer Eugene A. Fitzsimmons, a member of the Metropolitan Police Department for the District of Columbia. This affidavit in its entirety is therefore set forth herein as follows:

"METROPOLITAN POLICE DEPARTMENT, Thirteenth Precinct

AFFIDAVIT IN SUPPORT OF A COURT OF GENERAL SESSIONS ARREST WARRANT CHARGING OPERATING A DISORDERLY HOUSE FOR ERNEST AUSTIN, THE OWNER AND OPERATOR OF A TOURIST HOME LOCATED 1410 Belmont Street, N. W. WASHINGTON, D. C.

Information was received at the office of the Vagrancy Sqd. of the Thirteenth Precinct the tourist home located 1410 Belmont Street, N.W. was being operated as a disorderly house. The officers of this Sqd. were assigned to investigate.

On Friday, October 22, 1965, Officers Harrigan and Fitzsimmons parked a police cruiser on Belmont Street in a position so as to keep this establishment under observation. Between the hours of 1:15 A.M. and 3:10 A.M., we observed four females known to us to be prostitutes enter this establishment with white suspects suspected tricks. None of these prostitutes remained more than 20 min.

At 1:50 A.M. on 10/23/65, Officer Whitehead of the Thirteenth Precinct went to the above tourist home in the company of a well known prostitute who was working as a special employee of the police department. They rang the bell and door was answered by the owner and operator Ernest Austin. They stated they would like to rent a room for a couple of hours. Mr. Austin told them that the rate was $4.10 for two hours. They agreed to this and Mr. Austin told them to sign the book. Officer Whitehead signed as Thomas Whit. Mr. Austin told him to put Mr. and Mrs. before his name. Officer Whitehead did this and they were given room #8 of the 2nd floor. They stayed in the room for a period of time and left. The officer was in the room for about a half hour.

On Friday, November 5, 1965, Officers Harrigan and Fitzsimmons again parked our car on Belmont Street, and kept the premises under observation from 1:30 A.M. until 3:05 A.M. during this period of time we observed three girls known to us to be prostitutes enter the suspected tricks. They stayed in the room for about 20 min.

On Saturday, November 6, 1965, Officer Harrigan went to this address in the company of a well known prostitute who at this time was working as a special employee of the police department. He asked Mr. Austin if he could rent a room for about an hour Mr. Austin told him that it would cost him $4.12 he agreed to this and was told to sign the register as Mr. and Mrs. He then signed the register as Mr. and Mrs. John Thomas of 308 58th Avenue.N.Y.C. He and the prostitute were assigned room #7. He stayed in the room with the prostitute for about 15 min. and left the premises.

On Saturday, November 13, 1965, the above premeses were kept under observation by Officers Harrigan and Fitzsimmons from 2:20 A.M. until 3:40 A.M. During this time we observed two girls known to us to be prostitutes enter this establishment.

On the basis of my own observations, described above and the information obtained from Officers Whitehead and Harrigan (all of which was personally related to the undersigned) The undersigned is positive that the premises located 1410 Belmont Str. is being located as as Disorderly House in violation of Title 22, Section 2722 of the D.C. Code, and that the owner and operator Ernest Austin are responsible for such operation.

Eugene A. Fitzsimmons
Thirteenth Precinct"

Appellant was arrested pursuant to an arrest warrant supported by the above affidavit as probable cause. Prior to trial appellant filed a motion to dismiss information which was heard by the Court and denied, several weeks before trial. This motion was renewed at

at the opening of trial and at the conclusion of the Government's case against appellant and again at the conclusion of the trial against appellant. This motion is set forth as follows:

"DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS
Criminal Division

UNITED STATES	*	
Vs.	*	U. S. 10134-65
ERNEST AUSTIN	*	
and	*	
DISTRICT OF COLUMBIA	*	
Vs.	*	
ERNEST AUSTIN	*	D. C. 35554-65

MOTION TO DISMISS INFORMATION

Comes now the defendant herein and respectfully moves this Honorable Court to dismiss the information herein, charging this defendant with Disorderly House, Violation of Title 22, Section 2722 and Vagracy, violation of Title 22, Section 3302, of the District of Columbia Code (1961 ed.) and for reasons therefore and in support thereof petitioner does aver that this Honorable Court cannot Constitutionally charge this petitioner with the violation of any law, ordinance, regulation, or statute, or otherwise preside for judical purposes over this petition as a Court of Law or Equity, nor can this Honorable Court Constitutionally conduct any trial in which this petitioner is allegedly charged with the violation of any law, ordinance, regulation, or statute, as aforesaid. And for reasons therefor and in support thereof petitioner sets forth the following:

1. That the Judges of this Honorable Court are appointed pursuant to Title 11, Section 752, of the District of Columbia Code (1961 ed.). Pursuant to said Section, the Judges of this Honorable Court are appointed by the President with the advise and consent of the Senate. Defendant and petitioner herein is a citizen of the District of Columbia and has no vote in the Senate of the United States.

2. That the citizens of the Several States, having a vote in the Senate are granted the equal protection of the laws and the Privileges and Immunities of citizens among the Several States. Petitioner avers that an essential, necessary and indispensable part of the granting of the equal protection of the law, as well as the due process of law, commences with the nature, orgin and composition

of the Judiciary.

3. Petitioner alleges that the acts of this Court are consistent with due process as to all citizens among the several states except the residents of the District of Columbia and specifically as to this petitioner who does not participate in the advise and consent and hence the ratification of the exercise of this Honorable Court.

4. And therefore, because of the matters hereinabove set forth the defendant petitioner herein, by being exposed to the pains penalties and privileges of this Court is being effectively and affirmatively denied the same privileges and immunities of citizens in the Several States to which he should be entitled as a citizen of these United States pursuant to Article IV, Section 2, of the Constitution of the United States of America.

5. That petitioner being precluded from the participation in the construction of the Judiciary but nevertheless being subject to this Honorable Court is being denied Ab Initio the due process of las as set forth in the Fifth and Fourteenth Ammendment of the Constitution of the United States of America.

6. That the exclusive jurisdiction over the District of Columbia by the Congress as set forth in Article I, Section 8, of the Constitution of the United States of America does not confirm nor sanction the peresent disability of petitioner because the Ninth Ammendment of the Constitution sets forth that the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people. And the Tenth Ammendment sets forth "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." And the authority defined in Article L, Section 8, as to the jurisdiction by Congress over the District of Columbia is by mandate of the Constitution to be the same as is exercised by like "Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." Nowhere in any of these like applications are Citizens of the United States denied the participation in the Confirmation of the Judiciary and hence the equal protection of the laws is being denied and petitioner disenfranchised from the Privileges and Immunities of Citizens in other Jurisdictions.

7. Petitioner avers that due process of law under the Constitution of the United States of America demands being subject to not only the Judiciary in its acts but the participation in the creation and maintenance of the Judiciary as an Arm of Government. And only in such manner can the creation of this Court comply with the requirements to be set by the test of a Republican Form of Government as set forth in Articile Iv, Section 4, of the Constitution of the United States of America, under which this petitioner further claims his rights. Neither petitioner, nor any proper person on his behalf has consented to suffer the relinquishment of the right to participate in the advise and consent in the creation of the Judiciary. That for

the foregoing reasons the defendant herein prays these informations be dismissed."

2. On June 1, 1966, appellant was tried simultaneously by the Court on the vagranch charge and by a jury on the disorderly house charge. Appellant was found not guilty of the vagrancy charge; the jury found appellant guilty of keeping a bawdy house. Appellant was sentenced to 90 days imprisonment (suspended) and fined $250.00. During the course of the trial against appellant, the entire case consisted of the testimony of the officers who appear in the affidavit. Appellant requested during trial that the prosecution be required to produce the alleged prostitutes referred to in the officer's affidavit in Court for corroboration, verification and cross examination. Appellant requested that the prosecution be required to produce the arrest records of the alleged prostitutes to prove their character. Appellant took the position in support of his argument that any police office could give a naked and unsupported statement and cause the arrest of any citizen or attack the operation of any hotel or tourist home with impunity. The trial Court rejected the arguments of appellant and permitted the unsupported testimony of the officers to go before the jury as constituting all of the prosecution's evidence against appellant. The alleged prostitutes were never required by the Court to be produced and appellant was not afforded an opportunity to be confronted by, or cross examine such important witnesses. Repeated objections were made by appellant to the admission of such testimony. The trial Court required objections to be made at the bench, whereupon, none of said objections

or numerous motions were recorded by the Court Reporter. (TR.10) The trial Court permitted the alleged prostitutes to remain anonymous to the appellant and jury at all times thereby making the allegations of the arresting officers uncontested and unassailed matters of fact both as to the existence of such prostitutes and their character, (TR.29,30) and denying appellant the right of confrontation and examination. (TR.4,8,9-18). At the bench conference (TR.10) counsel for appellant was directed not to demand the presence of the alleged prostitutes or their records and was restricted only to asking the officers testifying about such matters within narrow limitations defined by the Court (TR.21). The Court Reporter was directed by the Court not to record all these bench conferences between counsel and the Court and appellant's rights were thereby impaired for purposes of appeal, notwithstanding appellant's request at the initial bench conference to have all such matters recorded, which request was denied by the Court (TR.10,28,29.)

3. The trial Court denied appellant the right to establish a foundation for appellant acting pursuant to Title 47, of the Code of Laws for the District of Columbia, Section 2902, which reads as follows:

> "(a) It shall not be lawful for the keeper, proprietors of any licensed hotel, tavern, restaurant, ordinary, sample-room, tippling-house, saloon, or eating place, to refuse to receive, admit, entertain, and supply any quiet and orderly person or persons, or to exclude any person or persons on account of race or color. (TR.31,32,37,38,39, 43,55)."

4. The prosecution witnesses consisting only of the police

officers, testified they paid several women, whom the officers characterized as prostitutes, to accompany the officers to the business establishment of appellant. The thrust of the prosecution and conviction of appellant rests solely upon appellant permitting these police officers and women to enter this tourist home, register as man and wife, remain for a short period of time in an assigned room and leave. There were no overt acts or omission of any acts required by law as to appellant. The fact that appellant permitted the officers to enter with women is what is alleged herein as being a crime. The police officers admit and the record is clear that; 1. Appellant's wife has a valid license to operate a tourist home (TR.57). 2. That the police officers observed male and females couples of mixed races enter and leave appellant's tourist home after remaining there short periods of time. 3.That the police officers themselves paid certain females to accompany them to appellant's tourist home and register as man and wife. 4. That at the time the officers and their female companions registered, they and all parties were well behaved, well dressed, orderly and conducted themselves properly. 5. That the police officers registered falsely and their female companions in appellant's place of business, as man and wife, knowing the same to be false, and for the sole purpose of deceving appellant into letting the officers and their companions obtain a room in appellant's premises. (TR.33,38,44,45,46).

6. That appellant or his employees did register all said parties in the tourist home.

7. That the officers and their companions remained in their assigned rooms for short periods of time.

8. That the officers and their companions were not married.

9. That the officers and their companions left appellant's business after a brief, and varing period of time in a rented room, but in an orderly manner.

10. That the officers had previously noticed a few other male and females entering and leaving appellant's place of business together after short periods of time. (TR.4).

11. That other than permitting the entry of these persons, appellant has comitted no act contended here to be a crime.

12. That appellant's record book was admitted into evidence over objections. (Tr.8).

The record upon which appellant was convicted also indicates or supports the following statements of fact:

1. That under Title 47 of the Code of Laws for the District of Columbia, Section 2302, appellant was compelled to admit to his place of business under penalty of law, any quiet and orderly person or persons, or any persons without regard to race or color, since appellant's wife is possessed with a valid license to operate a tourist home and was therefore accountable thereby, under the statute to admit the public.

2. That there is no statutory requirement or prohibition against the owner of a tourist home or hotel to require guest to remain or refrain from remaining any particular length of time. Nor is it within the capabilities of a tourist home operator to enforce such a regulation. (TR.44-46,48).

3. That employees other than appellant were operating the tourist home during periods the business was under observation. (Tr.57-60). The Government did not contend that appellant personally admitted any

or all of the various couples who entered the premises and there was no showing that appellant ever knew or had knowledge of the transactions set forth in the testimonv of the officers, which were supposed to have constituted the offense. (TR.42).

4. The tourist home license which the Government stipulated into evidence showed clearly that the license to operate the tourist home which was the subject of the complaint therein, was not in the name of appellant at any time during the occurrences in question.

5. That the Government does not contend there is a regulation requiring all guest in tourist homes to be husband and wife and there is no statute requiring appellant or employees to require proof of the marital status of parties entering the business.(TR.18,19,22, 24,32,35). The Government never contended that appellant knew any of the female companions or anything regarding their character.

6. At the close of the case, over objection of counsel for appellant, the Court charged the jury that a bawdy house was defined by Title 22, of the District of Columbia Code, Section 2712, and defined the offense under this statute which is a felony. The charge to the jury should have been an attempt to define Title 22, of the Code of Laws for the District of Columbia, Section 2722, which is a misdemeanor under which the jury found the defendant guilty.

STATUTES INVOLVED

Constitution of the United States of America

Article IV, Section 2

Article I, Section 8

Article IV, Section 4

Ninth Amendment

Tenth Amendment

Title 11, District of Columbia Code, Section 752

Title 22, District of Columbia Code, Section 2722

Title 47, District of Columbia Code, Section 2902

Title 22, District of Columbia Code, Section 2712

SUMMARY OF ARGUMENT

1. The acts of the police officers constituted entrapment.
2. Appellant, under the facts, committed no punishable offense as charged.
3. The trial Court erred in not requiring a complete transcript of all bench conferences as requested.
4. Title 22, District of Columbia Code, Section 2722, is void because of vagueness.
5. The trial Court committed prejudicial error in its charge to the jury by defining a bawdy house under the language of Title 22, District of Columbia Code, Section 2712, rather than Title 22, Section 2722.
6. The trial of appellant in the District of Columbia Court of General Sessions was unconstitutional.

7. The trial Court erred in denying appellant's request that the prosecution produce corroboration of the officers' testimony.

ARGUMENT

ENTRAPMENT

1. The officers in the instant case were the sole evidence upon which the Government relied in the prosecution of appellant. The record demonstrates that the idea which constituted the alleged offense arose in the minds of the officers alone. Entrapment occurs when the criminal conduct was the product of the creativity of the officers. The officers admitted they used deceit to obtain entrance to the premises by claiming registration with an alleged wife knowing the same to be false and knowing appellant or appellant's agent would be defenseless to challenge the authenticity of such representation. Vaccaro v. Collier, 38 F.2d 862, modified 51 F.2d 17; Rittenour v. District of Columbia, 163 A2d 558.

The defense of entrapment is available if the entrapping officers perform any of the essential acts constituting the crime for which appellant is charged. Certainly the officers observing females entering and leaving appellant's place of business without a clear showing appellant aided and abetted, would not bring appellant under the acts of the alleged parties observed by the officers and known only to them. Nothing done by the entrapping person, who is present with the knowledge and consent of the victim, should be imputed to the accused and the prosecution must fail if

it is necessary that something done by such person should be imputed to accused in order to constitute the offense.

2. THE APPELLANT COMMITTED NO PUNISHABLE OFFENSE

The statute under which appellant was prosecuted and as applied was subject to the sunjected and uncorroborated testimonv of the officers. The license for the business was in the name of appellant's wife. There was no testimony connecting appellant with the various couples who were entering and leaving the tourist home. Appellant testified that other employees operated the business as well as appellant. There was no statute in anv event limiting the number of times a room could be rented in a tourist home ar the amount of time required to be spent in such room. The prosecution of appellant is in effect an attempt to hold appellant legally responsible for the moral conduct of others and the insurer to the public as to the good character of any person using his premises. No testimony, other than one entry on the record book connected appellant with the entry or departure of any persons. To enable this prosecution to stand would enable the police to pick and choose those whom they would prosecute. It leaves to the police department the selection of the type and place of the enterprise they will investigate and prosecute.

Appelant has been denied all presumption of innocence because of the vague generalities. The prosecution never proved bevond a reasonable doubt that appellant operated a bawdy house. There was no testimonv as to the reputation of the business, knowledge of appellant of any offense since the entrie evidence was the officers'

testimony, as constructed by them. The statute as applied permits and encourges discrimination against samall business men since there is no uniformity of application. An essential should have been the prosecution of all alleged prostitutes in the premises.

3. The trial Court erred by not requiring the Court Reporter to transcribe all bench conferences since all motions and many objections were made at the bench. This issue was not raised in the Court below since the very fact the issue was not properly recorded, caused the issue to have been lost on appeal below.

4. STATUTE

Whereas, the term "bawdy house" may have some meaning or context within the meaning of common usage, as applied to the tourist trade where the licensee or owner is dealing in the business of renting rooms and space, and where the licensee must deal with the public in good faith, it would appeal that such licensee is afforded no knowledge by statute of the precise circumstances which would bring him within a violation of the law, Boshuigen v. Thompson and Taylor Co., 195 N.E. 625, 360 111.160. And where the legislative intent, especially as to the matter or thing to which the act is intended to relate, and the specific result intended to be achieved, is not expressed with reasonable certainty, no effect can be given to the act. The intent of the legislature must appear from the language of the act itself either expressly or by necessary implication as to all effected by its provisions. It is essential that the statute itself speak in specific and definite terms, and be so framed that its terms and provisions may be known, understood, and applied, and a duty imposed by statute must be prescribed in terms

definite enough to serve as a guide to those who have such duty imposed upon them.

A statute is invalid for vagueness and the uncertainty when a person of ordinary intelligence cannot understand its meaning, or when reasonably minded persons cannot agree on its meaning, or when it requires or forbide the doing of an act in such terms that men must guess at their meaning. Here the appellant was licensed to accept people in his premises. The restrictions inherent in his license do not put appellant on notice of the acts of which complaint has herein been made. So too, a statute is invalid when persons of ordinary intelligence must guess at the applied meaning of the statute and differ as to its application.

Conclusion

WHEREFORE, it is respectfully submitted that the petition for allowance of appeal from the decision of the District of Columbia Court of Appeals should be granted.

Respectfully Submitted

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief was delivered to the Office of the United States Attorney, United States Courthouse for the District of Columbia, this _____ day of January, 1968.

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